REVIEWS

Michael J.R. Crawford, **An Expressive Theory of Possession**, Oxford: Hart Publishing, 2020, xxii + 206 pp, hb £58.50

Most scholars of property law, at least in common law jurisdictions, subscribe to the view that there exists a rule of law that has the following content: when a person takes possession of land, or of a chattel, that person acquires a proprietary interest in relation to that land or that chattel. This interest is good against all those who do not have a stronger title, and those without a title stronger than that of the possessor will commit a legal wrong against her if they interfere with the land or chattel. Behind these propositions lie a number of puzzles. When will a person 'take possession' such that this proprietary interest arises? And why should we distribute unowned resources according to a rule of first possession, and not some other rule? In this book, Michael J.R. Crawford adds to the literature that examines these questions, and offers a theory of the rule that draws upon an impressively broad array of sources, ranging from the doctrinal to the game theoretical.

Before offering that theory, Crawford presents, in two introductory chapters, an admirably concise and clear restatement of the view that the basics of property law can best be understood by starting with the proposition that an owner of property is that person who has a right to exclude others from physically interfering with that property. Building out from that claim, Crawford argues that the role of possession in the law can be easily stated: the act of taking possession is one method – like others such as manufacture – by which one can acquire a right to exclude others from a particular item of property. Thus, possession is *factual*, and does not describe a *right* of any sort. It follows, on this account, that it is unhelpful to say that the property torts are concerned with interferences with possession. Suppose that I go on holiday and leave my bicycle unattended outside the front of my house. I can bring a claim in conversion against its thief. This is because I have a right to exclude others from the bicycle, and not because I 'possess' it despite being unable to touch, move, or physically prevent others from taking it (51).

With this framework in place, Crawford moves on to set out his theory of possession, which comes in two parts. The first examines the concept of 'taking possession' and asks what it means. He argues that many definitions of the concept – that focus on a person's control of a thing and on their intention in exercising that control – are wrong. Instead, a person will take possession of land or of a chattel wherever they perform an act that is, as a matter of social fact, an accepted way of signalling that person's intention to claim the land or chattel. Second, Crawford asks why possession has taken on its role as a method of creating property rights. His answer is that the law gives effect to a non-legal

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convention, that has, for reasons of human psychology, emerged as a salient way of resolving a coordination problem caused by the scarcity of resources. Possession (and its absence) is a very visible asymmetry that exists between two people in competition for a resource, and so the non-possessor spontaneously defers to the possessor's claim. Over time, a convention is created and, with it, norms which guide behaviour. It is in our interests to respect the convention, lest others take it upon themselves to challenge our own holdings.

Assessing theories of private law is a notoriously difficult task. Crawford's main aim is to promote understanding of the law as it is. He claims that the first limb of the theory 'accurately describes the way in which possession works in the law' in ways that other theories do not (64), and that the law's rules 'cannot be understood' in isolation from the second (113). Are either of these claims convincing? The first is hard to make out because Crawford does not offer a detailed account of alternative 'theories' of what it means to take possession. Clearly, the main competitor is one that defines possession as an appropriate degree of physical or factual control, paired with an intention to exercise that control on one's behalf. What it might mean to have such 'control' is not explicitly spelled out. Crawford primarily thinks of control as a factual ability to physically prevent other people from interfering with the land or chattel, but this is clearly not what the law requires. Nor is it impossible to think that 'control' might mean something very different: if I am steering a cruise ship, we can say that I control that ship, but I cannot hold it or physically prevent people from interfering with it, because of its size.

This lacuna leads Crawford into difficulty because he offers a theory *of* the law that appears to aim at replacing the law. It is the control-plus-intention test that courts actually apply to disputes, and it has the backing of a unanimous House of Lords (*Pye* v *Graham* [2002] UKHL 30). If our aim is to understand the law *as it is*, then we surely need very convincing reasons to suppose that the test does not accurately capture the law's substantive content. Without a detailed analysis of what the test might mean, and how those possible meanings map onto the case law, it is hard to see how a theory of the law can be justified in rejecting it.

On the second claim, it is not made entirely clear why we should accept that we *cannot* understand the law without Crawford's theory. Why do we need to know the cause of a legal rule if we are to understand its operation? It cannot be because we need that knowledge to iron out wrinkles in the law or to resolve novel cases. No matter how correct Crawford's theory of possession is, it cannot, without more, generate claims about how the law ought to deal with a given set of facts.

Seemingly aware of this point, Crawford offers, in addition to his theory, a normative defence of the law that is later used to resolve a number of well-known controversies. That defence is, again, composed of two elements. The first is the claim that the law is 'minimally fair' because 'no one is systematically excluded from benefitting from it' (132). Anyone can stake a claim to property by taking possession, and so no one is excluded from the rule on the basis of arbitrary personal characteristics such as their race or gender. The difficulty with this argument is that it seems to be wrong, in that it overlooks that some people,

who are not able-bodied, may be excluded by a rule that requires them to perform physical acts. Crawford recognises this problem but is content to allow 'redistributive mechanisms' to correct this particular form of unfairness (134). Second, Crawford argues that the status of possession as a non-legal convention gives the law some good reasons to rely on it. In particular, he endorses the argument, most prominently made in a series of works by Thomas Merrill and Henry Smith, that law that is self-applying is likely to lead to minimal disputes and low administrative cost.

A reader new to property theory may wonder whether this is really the best that can be said in defence of the law. Crawford does not engage with the substantial literature that seeks to provide such a defence, but instead endorses the view that any such account is doomed to fail because it cannot get over the hurdle posed by the 'unilateral' element of acquisition: 'as a general philosophical matter, it seems impossible to explain why any nominally duty-imposing act should bind others in the absence of their consent' (123). This brief statement of the hurdle does not provide a full reflection of that philosophy. It has, for example, been argued – most prominently by Kant and his modern followers – that the problem could be dissolved through some legislative act of the state, or, alternatively, that the troubling features of a unilaterally imposed duty might be outweighed if the interests that the duty serves are sufficiently important. Although one might argue that neither of these responses is adequate to meet the unilateralism objection, it is a shame that Crawford does not consider them.

Given that Crawford's arguments provide only a relatively weak normative defence of the law, the prescriptive claims that he makes in the final few chapters are somewhat undermined. He considers three problematic areas: disputes between a finder of a lost chattel that is found on land occupied by someone who is not the owner of that chattel; the application of the law where the possessor in question is a thief; and the treatment of the good faith purchaser at common law. His argument in relation to the third can be the most easily stated: there is a conflict between the original owner and the purchaser because that purchaser has formed an expectation – on the basis of convention – that the seller of the property has an entitlement to it. There is therefore no good reason to favour one over the other, and we should be content with a certain rule that always favours original owners, or that always favours the bona fide purchaser (196).

The discussion of the other two problems is more interesting. Crawford argues that the rules governing lost chattels found on or under land should not be understood as being examples of the occupier of that land having possession of those chattels. Instead, 'occupation of land' lines up alongside manufacture and taking possession as one method by which one might acquire new rights in chattels (159). The reason for this is that a land occupier has no *intention* in relation to chattels lost by others on her land, and, Crawford argues, one cannot signal one's intention to claim a chattel if no such intention exists (66). Of course, it follows that the orthodox understanding of possession, as control plus intention, also straightforwardly suggests that these rules are not possessory.

Finally, Crawford endorses the view that a thief ought to acquire a proprietary interest in stolen property. He claims that, because people lack the information required to discern between innocent possessors and thieves, people will defer

to a thief's possession regardless of the law's position (178). It is, however, hard to see how this can take the form of an argument about what the relevant legal rule *ought* to be. Crawford might be taken to be arguing that, if the law did not recognise title in the thief, it would not benefit from those values that a convention-based legal rule might be said to promote. If our focus is on minimising cost, plausibly the law's rules should be easy to follow, and one might think that citizens are more easily guided by norms of law that tell them not to interfere with possessed property, rather than norms that tell them not to interfere with innocently-possessed property. I doubt, however, that this argument works in this context. Those who deal with stolen property will owe duties in relation to that property to its true owner, and people will generally assume property that is possessed to have an owner. It follows that the norms imposed by the law in relation to a stolen chattel – even if the thief acquires no right that others not interfere with it – are perfectly clear and will be self-applied by citizens: do not interfere with it, because it is not yours.

Crawford's monograph is a welcome addition to the literature that examines personal property doctrine from a theoretical perspective. There is much to be gained from a close reading of his arguments, which cut across disciplines and should give as much food for thought to doctrinal lawyers as to legal theorists. If personal property scholarship is to make real progress, more work of this sort – that weaves doctrine and theory together – is sorely needed.

*Alexander Waghorn**

Ernest Lim, **Sustainability and Corporate Mechanisms in Asia**, Cambridge: Cambridge University Press, 2020, xix + 409 pp, hb £95.00

When I first picked up Ernest Lim's *Sustainability and Corporate Mechanisms in Asia*, it was not without reservations that it would be dry, uninspired, and inaccessible. However, as I quickly discovered by the first chapter, my reservations were unfounded. As it turned out, the book was clear, eye-opening, and absorbing.

The key issue which *Sustainability and Corporate Mechanisms in Asia* deals with is whether certain corporate mechanisms affect sustainable development in four common law jurisdictions in Asia: Singapore; Malaysia; Hong Kong; and India. Lim, quoting from the Brundtland Report (issued by the United Nations' World Commission on Environment and Development (WCED)), helpfully frames 'sustainable development' as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. The corporate mechanisms in question, of which there are six, are: (1) sustainability reporting; (2) board gender diversity; (3) constituency directors; (4) stewardship codes; (5) directors' duty to act in the best interests of the company; (6) and liability of companies, shareholders and directors.

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While I understand that there is extensive literature on the relationship of company law, on the one hand, and sustainability, on the other, Lim's book is original, perceptive and distinct from existing literature in at least three respects. First, most existing literature tend to focus on the United States, United Kingdom or European jurisdictions. There is less of such literature focussing on Asia, and I imagine even less which approach the subject by taking a comparative review of jurisdictions in Asia.

Second, it is important to highlight that an unusual feature of the four common law jurisdictions of Singapore, Malaysia, Hong Kong and India, especially when compared to other common law jurisdictions such as the United States and United Kingdom, is that the controlling shareholder in a substantial number of the largest companies in Singapore, Malaysia, Hong Kong and India is the government through its state owned enterprises (SOEs). An issue which has therefore received limited attention in existing literature in this area is the role of the SOEs in encouraging or frustrating sustainability through the aforementioned six corporate mechanisms. The existing scholarship on sustainability places considerable emphasis on the role of institutional shareholders, particularly socially responsible investors or impact investors, in promoting sustainability. This is perhaps understandable because institutional shareholders are the world's largest group of shareholders. However, government owners constitute the second largest percentage of shareholders in the world, and SOEs, of which the government is the controlling shareholder, are a pervasive and critical feature in many jurisdictions around the world especially in Asia ('Owners of the World's Listed Companies' OECD Capital Market Series, 2019). Yet there appears to be little critical examination of this topic (even in recent, leading scholarship such as Sjåfjell-Bruner (eds) *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, CUP, 2020. Lim's book has filled this lacuna. He challenges the reader to reconsider whether certain aspects of corporate mechanisms that originated in the Anglo-American jurisdictions are appropriate or effective for promoting sustainability when transplanted to the Asian jurisdictions with concentrated ownership companies, such as SOEs.

Third, Lim's book marks a significant shift in the debate from one based on an actor-centred approach (which compares the effects of the values and attitudes of key stakeholders such as senior management and consumers on sustainability) and a behaviour-centred approach (which compares companies' sustainability behaviour across different countries) to one that is based on the effects of corporate mechanisms on sustainability, and how the pursuit of sustainability ought to shape the reforms in corporate governance. Non-legal literature seems to be principally concerned with both the actor-centred and behaviour-centred approaches (see Williams and Aguilera, 'Corporate Social Responsibility in a Comparative Perspective' in Crane et al (eds), *The Oxford Handbook of Corporate Social Responsibility*, OUP, 2008). The shift in focus in Lim's book complements the existing non-legal research by opening up new avenues of inquiry. For example, because the law not only reflects public interest and social values, but also directly or indirectly constitutes them, it is worthwhile inquiring how corporate law and governance has constituted the values and attitudes of stakeholders toward sustainability. Moreover, another topic worth exploring is whether

stakeholders' behaviour regarding sustainability is different in companies with controlling shareholders, particularly the government in SOEs, as compared to companies with non-controlling shareholders.

Lim devotes one chapter in turn to each of the six corporate mechanisms. In Chapter 2 on 'Sustainability Reporting', Lim analyses the structure and contents of sustainability reporting rules, in particular, the merits of a comply or explain approach taken by these rules, as well as the dearth of external oversight on these rules, and the lack of sanctions for breaching them. In Chapter 3 on 'Board Gender Diversity', Lim considers whether having female directors improves corporate governance and the financial performance of a company, and critiques existing measures taken by companies in the four Asian jurisdictions to increase the number of female directors. In Chapter 4 on 'Constituency Directors', Lim examines the pros and cons of having constituency directors (which are directors who are appointed by non-shareholders – a feature which does not exist in Singapore, Malaysia and Hong Kong), to promote sustainability. In Chapter 5 on 'Stewardship Codes', Lim investigates whether stewardship codes (ie standards of conduct for institutional shareholders) have been effective in promoting sustainability in the four common law jurisdictions and proposes reforms to these codes. In Chapter 6 on 'Directors' Duty to Act in the Best Interests of the Company', the issue of whether a director's duty to act in the best interests of the company can also be used to promote the interests of non-shareholders, employees, the community and the environment is examined. In Chapter 7 on the 'Liability of Companies, Shareholders and Directors', Lim evaluates how courts and legislation, in order to circumvent the limited liability principle of companies, have lifted the corporate veil and imposed liability on directors, shareholders or the entire corporate group for the wrongs committed by a company (or on a parent company for the wrongs committed by its subsidiary).

It is difficult to find fault with the soundness of Lim's methodology or the extensiveness of his research; evidently, a staggering amount of research has gone into the book. Lim has pored over data from the reports of the top fifty listed companies by market capitalization in each of Singapore, Malaysia, Hong Kong and India (ie an eye-watering two hundred reports in total), and used hundreds of sources of academic literature. In terms of legal academic literature, Lim refers to literature from Singapore, Malaysia, Hong Kong, India, and from other common law jurisdictions such as the United States and United Kingdom, as well as from civil law jurisdictions, such as Germany and France. As is probably necessary for a topic as broad and current as sustainability, Lim additionally considers social, economic and cultural perspectives, quoting, for example, from John Rawls and Ronald Dworkin. And, fittingly for a book focussed on Asia, Lim occasionally dips into Mahabharata, the Koran and the teachings of Confucius.

Lim argues clearly and cogently throughout his book, but what I appreciate most about his arguments is that they are also fair and balanced. He thoughtfully considers different points of view, and where the data does not support a neat and convenient conclusion, he readily admits that it does not. For example, and somewhat surprisingly (at least to me), in Chapter 3 on 'Board Gender Diversity', he concludes that the available data and studies do not unequivocally

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demonstrate that having female directors improves corporate governance or the financial performance of a company.

Of all the chapters, I found two especially thought-provoking. The first is the aforementioned Chapter 3 on 'Board Gender Diversity'. Although Lim concedes that having more female directors may not improve corporate governance or the financial performance of a company, he argues that having female directors cannot be justified only in terms of such utilitarian benefits. There is, disquietingly, a significantly unbalanced proportion of female to male directors in the top fifty listed companies (by market capitalization) in Malaysia, Hong Kong, India and Singapore. As of 2018, female directors make up 27.9 per cent, 18.2 per cent, 16.7 per cent and 15.8 per cent of the boards of such companies in Malaysia, Hong Kong, India and Singapore respectively, and Lim makes the case that companies should examine what are the social, economic and cultural issues that women face that led to this inequality in the first place, and what companies can do to address these issues. Here, Lim helpfully offers simple, practical and concrete steps a company can take to promote the welfare of women and ensure a more level playing field between men and women in the search for directors – providing childcare support; enhancing maternity leave; implementing flexible working arrangements; correcting pay discrepancies between men and women; having mechanisms to address discrimination in the workplace; requiring head-hunters to produce female candidates when recruiting for directors; and grooming internal female employees for board positions. Lim humorously suggests, as others have, that 'the Lehman crisis would not have happened if it had been Lehman sisters instead of Lehman brothers', and one cannot help but wonder if he is right.

The second chapter I found particularly thought-provoking is Chapter 7 on 'Liability of Companies, Shareholders and Directors'. The issue which Lim examines in this chapter is whether the victims of harms committed by a subsidiary company can seek compensation from the parent company (or a shareholder of the parent company) if the subsidiary company is unable to compensate the victim because the subsidiary company is insolvent or has no financial means to do so. Although an answer in the affirmative would be contrary to the central tenet of company law of limited liability, Lim correctly points out that it is this tenet which encourages a parent company to undercapitalise its subsidiary companies or structure its subsidiaries in such a way so as to minimise its liability, for example, by having its valuable assets owned by one subsidiary while having its hazardous business undertaken by a different (and undercapitalised) subsidiary. Although structuring companies as described above is not illegal, Lim forces us to question whether corporate law should, in the first place, permit a company to manipulate its group structure in a way which allows it to engage in hazardous activity without a need to bear responsibility for the harm it causes. Here, Lim makes the case that the fact the controlling shareholder in a substantial number of the largest companies in Singapore, Malaysia, Hong Kong and India is the government has an important bearing on this question. Given that the government has the responsibility to safeguard the social and economic wellbeing of its population, and given that the government has the resources and expertise to actually do so, Lim argues that is fair, just and efficient that

victims of harms committed by a company should be allowed to seek redress from the government where the government is the controlling shareholder. I agree.

If I had one criticism of Lim's book, it is that it appears to be written with academics as its target audience in mind. One instance of this is in Chapter 7 on 'Liability of Companies, Shareholders and Directors' where Lim goes to considerable lengths to explain the difference between creating an exception to the principle of limited liability (ie creating an exception to the principle that shareholders are not liable for the debts of a company and are only liable for any unpaid amount of their shares) and piercing the corporate veil (ie disregarding the separate legal personality of the company), and stresses the importance of not conflating the two. Although the difference is appreciated, it is not apparent if the difference is material since both would result in liability on the shareholder. And Lim observes that courts themselves do not always make the distinction when imposing liability on shareholders for the wrongdoings of a company.

In my view, it would be unfortunate if Lim's book is only limited to academics as its audience. *Sustainability and Corporate Mechanisms in Asia* is an important, erudite and accomplished work. It should be read by the very directors, C-suite executives, policy makers and leaders responsible for corporate social responsibility in the very companies which are the focus of his book. I recommend it without hesitation to anybody who has an interest or stake in corporations and sustainability in Asia. Because, as Lim has eloquently and persuasively argued throughout his book, there is not only a clear and positive correlation between sustainability and a company's financial performance, but because corporate sustainability 'is a morally good thing to do'.

*Edmund Lee**

C. Op den Kamp and *D. Hunter (eds)*, **A History of Intellectual Property in 50 Objects**, Cambridge: Cambridge University Press, 2019, 429 pp, hb £17.99

A History of Intellectual Property in 50 Objects is a collection of essays about the history of the branches of law that we today term intellectual property, each chapter taking a single object as its starting point. Spanning a diverse range of objects, from the twelfth century to today – from the Mona Lisa to the Kodak Camera, the Lego Brick to the Internet – *A History of Intellectual Property in 50 Objects* is based on the idea behind the BBC Radio 4 series *A History of the World in 100 Objects* presented by Neil MacGregor of the British Museum (published by Penguin, 2012) which has also been adapted to popular subjects such as *A History of Cricket in 100 Objects* (Serpent's Tail, 2013). Approaching intellectual property through objects, however, is more complex. Intellectual property is thought to protect intangible subject matter rather than tangible objects. As editors Claudy Op Den Kamp and Dan Hunter note in their introduction,

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approaching intellectual property through objects raises the question of how and whether the law reflects the theoretical assumption we have today, that intellectual property involves a 'separation between '"the thing" and the "idea of the thing'" (2).

The essays comprising *A History of Intellectual Property in 50 Objects* are authored primarily by legal academics, but also by scholars from other disciplines (for example art, history, film studies, and computer science). All the contributions are scholarly and rigorous – based on original research – but also accessible to the non-specialist reader. As the sheer diversity of subject matter makes a comprehensive summary impossible, this review instead draws together five examples of perspectives that permeate the volume and demonstrate the scholarly value of studying intellectual property from the standpoint of objects.

First, a number of the essays demonstrate that objects can take us to intricate stories about legal development. Lionel Bently's essay concerning the Singer sewing machine in the nineteenth century, shows how the study of a single object can take us to cases which 'unknowingly' provided 'the foundations for much of modern trade mark law', for example the doctrine of genericide, the concept of the public domain, as well as ideas about the 'selling power' of a mark (77-79). Stefania Fusco, in discussing the Murano glass vase, shows how glassmakers were granted ad hoc patents by the Venetian state from the late fifteenth to eighteenth centuries (18). When, from the sixteenth century, glassmakers began to leave Venice to relocate elsewhere in Europe, 'they took with them their understanding of the benefits of an exclusive right to practice their inventions' and these understandings contributed to the establishment of patent laws in other countries for example Belgium, France and England (22-23). Dev Gangjee uses the history of Champagne as a means of looking backwards, but also speculating forwards, about sui generis protection for geographical indications. He shows that Champagne has exercised a formative influence on the law in the twentieth century, but the 'story of Champagne is still being written': with climate change possibly shifting the focus of wine-making away from continental Europe, Champagne's 'powerful influence' on geographical indications may in the future instead come from England (167).

Other chapters, ask whether the history of a single object can reveal something timeless about intellectual property. Drawing on original archival material, Jane Ginsburg shows a successful application for a papal privilege from the 1590s, for Antonio Tempesta's Map of Rome, to span 'the full range of modern intellectual property rhetoric, from fear of unscrupulous competitors, to author-centric rationales' (42). While some debates from the past may feel familiar, their resolution is bound up with contingency, a point well illustrated by Peter Jaszi's chapter about Harriet Beecher Stowe's nineteenth century novel *Uncle Tom's Cabin*. Jaszi traces 'the winding path that copyright trod in the 19th and 20th centuries' concerning translation rights, international protection and term (81). History reminds us that the extensive protection which copyright works enjoy today, 'beyond the wildest imagination of Stowe and her contemporaries', is far from timeless or inevitable (87).

Secondly, a number of contributions to *A History of Intellectual Property in 50 Objects*, illuminate important stories about cultural developments. Michael

Punt argues that eighteenth century copyright statutes protecting engravings in Britain underpinned the development of Hogarthian art. Copyright gave the artist William Hogarth 'the financial security to use art and aesthetics as an instrument of political resistance' (55). Chris Beauchamp shows that the intervention of Alexander Graham Bell's patent lawyers, defining the invention broadly in the patent, coupled with the subsequent upholding of that patent by the US courts, contributed to popular understandings of Bell as the inventor of telephone technology: 'the saga of Bell's patent framed the way that the origins of the telephone have been understood ever since', that is, 'a single invention, arrived at by a single person in a decisive break from the prior art' (103).

Thirdly, a number of essays provide a sophisticated understanding of the relationship between law and technology. Maurizio Borghi charts the diversity of early twentieth century legal responses, in different jurisdictions, to the emergence of the player piano, technology that marked 'the beginning of a war over the control of music and content that is being fought to this day' (153). Peter Decherney discusses the Kinetoscope developed by Thomas Edison in the late nineteenth century: a peep-show device for individual spectators to peer into and watch moving images. Today, devices for viewing films by single spectators are 'staples of our existence', yet in the late nineteenth and early twentieth centuries, audiences preferred collective viewing of projected films (135). Connecting innovative but unpopular technologies of the past, to those that are ubiquitous today, Decherney shows the history of technology to be punctuated by stops and starts, the picking up of 'lost threads' and the taking of 'new directions', rather than a single linear narrative of technological development (135).

Fourthly, foregrounding objects and their protection by intellectual property laws over a long time-frame, enables interesting observations about rights-holder behaviour over a long trajectory. Jeannie Suk Gersen, in a chapter about the Chanel 2.55 handbag, shows that Coco Chanel, in the 1950s, openly encouraged the copying of her works. By contrast, by the 1980s, with the rights in the hands of Chanel Inc, the approach was far less forgiving of imitation, with millions spent annually on anti-counterfeiting (252). As a consequence, the bag has a 'duality' as 'both the paradigmatic original and the archetypal copy – an embodiment not only of authentic and rarified luxury, but also of fakeness, repetition, reproduction and substitution' (253).

Fifthly, essays in this collection demonstrate that a focus on objects can expose the law's blindness towards certain perspectives. Marie Hadley considers the boxer Mike Tyson's tattoo, recreated without consent on the face of one of the actors in the film *The Hangover Part II*. Hadley notes a conflict between copyright and 'competing cultural rights to indigenous design forms', as Tyson's tattoo was itself inspired by *ta moko*, the tattooing practice of the Maori people of Aotearoa/New Zealand. Claims to the tattoo's appropriation reveal 'the difficulty of claiming one truth in an intellectual property world that was born in the Western philosophical tradition' (401). In another chapter, Kara Swanson shows how the story of patent protection for the corset, as an 'oh so feminine technology, challenged the association of technology, patents and invention with masculinity' in the nineteenth century (89). Not only was corset technology accessible to female inventors, but patent litigation, concerning the corset's

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utility, provided an opportunity to challenge 'the gendered assumptions of the lawyers, judges, and the law itself' (91).

The above five themes provide a non-exhaustive set of examples of the rich and varied scholarship in the essays comprising *A History of Intellectual Property in 50 Objects* and are indicative of the volume's undisputed scholarly contribution. As a whole, the volume is clearly organised, with the essays categorised into five chronological time periods. The book design is attributed to co-editor Claudy Op den Kamp, a scholar of film studies, and she brings a strong visual dimension. The collection contains copious colour illustrations and these are interspersed between the text in a creative way: text and image are intertwined in the narrative of each chapter. For instance, in Decherney's chapter (discussed above), a picture of a person enjoying the long-forgotten technology of past-times through head-phones – the Kinetoscope – is placed side by side with the familiar image today of a person listening to their i-phone. The reader, in one glance, immediately grasps the similarity of the two technologies. Similarly, in a chapter about the protection of the PH-Lamp in the twentieth century, full colour photographs of Poul Henningsen's designs communicates 'the marriage between the aesthetic and the functional', central to Stina Teilmann-Lock's argument about the difficulty of fitting the lamp into intellectual property categories. The images, therefore, are equal partners with the text in the stories told by each author. Indeed, in some cases, such as Swanson's chapter about the corset, punctuated by images which demonstrate the corset's contested cultural status, the images invite the reader to contemplate dimensions that go beyond those discussed in the text: 'the corset as a technology of race as well as of gender' (92-93 and caption on 91).

Despite these strengths – the high quality of individual chapters beautifully crafted into a single volume – there are shortcomings. The history of intellectual property, particularly copyright history, is a burgeoning academic field and the content of the volume should, at least implicitly, reflect developments in scholarship. While the collection does include contributions from a number of undisputed leaders in the field, there are also notable absences from scholars whose original work has been formative of our understanding of intellectual property history in recent years, together with an absence of even some tacit reference to their work. The result is that the volume, taken as a whole, occasionally does not fully represent the current state of learning in the field. For example, Robin Wright's chapter about the Audiotape Cassette looks forward to copyright debates of the twentieth and twenty-first centuries, including the legal treatment of private copying, but that story might also have been brought into conversation with nineteenth and early twentieth century private copying debates (charted in Alexander, *Copyright Law and the Public Interest in the Nineteenth Century*, Hart, 2010, 245, 282). In the Pre-Modern section, the shortest section of the book (comprising just four essays and which might have encompassed pre-statutory history in jurisdictions beyond Korea and Italian states) the problem is exacerbated by the odd editorial classification of Andrea Wallace's excellent chapter. The strength of Wallace's scholarship lies with original teaching about *reproductions* of the Mona Lisa in more recent times and not with its broad-brush claims about copyright history, suggesting the absence of

protection for art by privileges prior to the copyright statute in France passed in the late eighteenth century (25). The voice of Katie Scott, the author of the landmark work on the protection of art in France, whose extensive archival work has uncovered the multiplicity of ways in which art was protected in the *Ancien Regime* (*Becoming Property: Art, Theory and Law in Early Modern France*, Yale University Press, 2018) is wanting here. Editing a volume of this nature, of course, always involves difficult choices, but different decisions could have been made: one contributor to *A History of Intellectual Property in 50 Objects* is the author of two chapters (Peter Decherney) and one editor is the co-author of the editorial introduction and two chapters dealing with broadly similar subjects (Introduction, Lego Brick and Barbie Doll all co-authored by Dan Hunter).

Despite these criticisms, this volume is a pleasure to read and contains original scholarship of the highest quality. It is recommended both to scholars of law and the humanities, as well as being of general interest to legal practitioners and the general reader.

*Elena Cooper**

Hugh Collins, *Gillian Lester* and Virginia Mantouvalou *(eds)*, **Philosophical Foundations of Labour Law**, Oxford, Oxford University Press 2018, 368 pp, hb £75.00

Published seven years after the seminal book *The Idea of Labour Law* which fueled debates over the 'idea' and the 'normative foundations' of labour law (Langille and Davidov (eds), *The Idea of Labour Law*, OUP, 2011)), this book, written by leading philosophers and labour law scholars in the Anglo-Saxon world, makes a seminal contribution to the growing literature on the theory of labour law. For the editors, this book is original because it 'offers the opportunity to shape for the first time a wide-ranging and pluralist philosophical enquiry into the foundations of labour law, which in turn is likely to influence the development of the subject and the law in the future' (1). Couched in rather Platonic and natural law terminology, the book conceives its task as searching 'for the normative foundations of *something that already exists*, *albeit perhaps in a flawed form'* (16, emphasis added). In the editors' view, though, this philosophical endeavour is not of purely theoretical value. The discovery of the philosophical foundations of labour law is seen as a vital and to some extent existential exercise for the subject and paradigm of labour law.

The editors' introduction is followed by seventeen chapters organised in four parts: Freedom, Dignity, and Human rights; Distributive Justice and Exploitation; Workplace Democracy and Self-Determination; and Social Inclusion. This division is invested with a universalist normative significance as each part is claimed to represent a 'key set of values that need to underpin *any* labour law system' (20, emphasis added).

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Part I opens with two chapters targeting the traditional contractual framing of the employment relationship as a fundamental threat to human freedom. John Gardner considers the process of 'contractualisation' of the employment relation, understood as a reduction of the richness of the employment relationship to a bare contractual relation, as a pathology undermining human freedom and leading to worker alienation. Picking the same target, Hugh Collins 'argues that there is an inherent tension between the legal structure of employment and guarantees for the exercise of civil liberties and the principle of equality before the law' (48). He translates this contradiction into the positive labour law aim of 'reduction or elimination of the inherent conflict between the contract of employment and liberal values' (*ibid*). In the next chapter, Pablo Gilabert contributes an insightful elucidation of the concept of dignity at work as resting on 'solidaristic empowerment', a concept viewed as referring to the generation of 'feasible and reasonable social schemes to support each other as we pursue the development and exercise of our valuable capacities to produce in personally and socially beneficial ways' (86). Occupying a similar developmental paradigm of freedom as linked to human potential, Brian Langille argues that an understanding of human freedom as intrinsic and instrumental good inspired by the capability framework (by Amartya Sen and Martha Nussbaum) offers a better way of addressing the 'existential crisis of labour law' than the traditional inequality of bargaining power paradigm. Not straying far from this developmental approach to human freedom, David Cabrelli and Rebecca Zahn examine how the civil republican account of freedom as non-domination can be effectively deployed within a political and democratic framework for the justification of labour law. The last chapter of this part by Joe Atkinson combines a scepticism over the desirability of human rights as a single universal foundation for labour law with a thesis that a moral account of human rights is able to play an important justificatory role for the discipline as part of overlapping justifications.

The second part hosts multiple contributions dealing with the concepts of distributive justice and exploitation as part of the foundations for labour law. Guy Davidov develops a brilliant theoretical account on the implications of different liberal distributive justice theories for the legitimacy of different types of regulatory interventions. The chapter by Noah Zatz attempts to bridge the theories of discrimination and labour law by an integrated account that combines the structural focus of employment law theory with the inter-personal focus of anti-discrimination law theory. The remaining three chapters in this part question the concept of *exploitation* as a potential normative foundation for labour law. The philosopher Jonathan Wolff defines exploitation as 'a compound relationship in which an individual's vulnerable circumstances are used by another individual in order to achieve a benefit for the exploiter in violation of fairness or flourishing norms' (187) but is sceptical about whether a single account of the concept is appropriate, arguing that it operates at two distinct levels, namely that of the 'moral acceptability of the nature of the contractual arrangement and the moral acceptability of the process that led to the structural situation that created the exploited vulnerability' (*ibid*). In her highly original account, Virginia Mantouvalou draws on the philosophical concept of

exploitation (loosely inspired by a humanist interpretation of Marx) and applies it as the basis for broadening the scope of the application of the legal concept of exploitation beyond slavery, servitude, forced/compulsory labour law and criminalisation. Mantouvalou invokes a structural conception of exploitation as the normative basis for extending accountability beyond the employer towards the state when it 'knows or ought to have known of the vulnerability and the exploitation, or the immediate risk of exploitation' (190). Finally, Horacio Spector advances a risk theory of exploitation as the foundation for the legal right to fair compensation. For Spector, the source of exploitation derives from the fact that 'the structure of industrial capitalism allows capitalists to *systematically* exploit wage workers in gratuitously taking from them a surplus that they would be unwilling to relinquish if they were capable of spreading their occupational risk' (205, emphasis in the original).

The third part on self-determination and workplace democracy contains only two, albeit excellent, chapters. Building on earlier work on contestation and freedom of association Alan Bogg and Cynthia Estlund suggest a new pluralist foundation for the right to strike as resting upon three basic liberties: forced labour; freedom of association; and freedom of expression. The last chapter by Martin O'Neill and Stuart White reminds us of the vital political functions of trade unions in insulating the political sphere against the influence of the wealthy.

The four chapters in Part IV discuss social inclusion as a potential normative foundation. Adopting a critical-historical method, the chapter by Joanne Conaghan on 'Gender and the Labour Law' seeks to denaturalise the foundational labour law distinction between the 'paid' and 'unpaid' labour as contingent and historically determined and calls for the revisiting of the paid work paradigm. Subsequently, Einat Albin draws on Nancy Fraser's social justice account involving the dimensions of recognition, fair distribution and meaningful representation to strengthen the normative foundation of social inclusion. In her chapter on volunteer work, Sabine Tsuruda dismisses the current distinction between employees and volunteers on the basis of the character of activity (civic, humanitarian or charitable) and proposes instead the concept of 'merit inclusivity' defined as 'inclusivity with respect to skill and ability' (306) as better positioned to bring volunteer work within the orbit of labour law. Finally, the chapter by Mark Freedland examines the two 'pillars of the foundations of labour law's edifice of social inclusion', namely that of structuring/determining work relations and labour migration. Freedland concludes that both have 'recognisable philosophical foundations' but they both have 'deep conflictual cracks in these foundations which we should be concerned to expose and then try to repair' (323).

The book is to be commended for the high-quality and lucidity of its chapters and for charting some novel paths for future labour law scholarship, including an engagement with exploitation as a normative concept. In the current challenging times for labour law the prospect of finding a universal foundational ground is unsurprisingly an appealing proposition. Inevitably for an important work of such ambition and quality there will be some sources of controversy.

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Due to space considerations I must confine myself to briefly touching on two of them.

Firstly, one might wonder whether there was scope to better deliver the book's promise to 'offer the opportunity to shape for the *first time* a wide-ranging and *pluralist* philosophical enquiry into the foundations of labour law' (1, emphasis added). This is for at least two reasons. *The Idea of Labour Law* and subsequent scholarship made a broadly similar liberal analysis of the 'normative foundations' of labour law. Hence the editors could elaborate more on the distinctiveness of the concept of 'philosophical foundations' as opposed to the established term 'normative foundations' along with explaining the analytical mileage gained by this substitution. Without this explanation, the assertion that this is the *first* book to shape this debate appears vulnerable to the criticism that it understates its continuity with previous literature. Similar concerns may be voiced in relation to the pluralist nature of the philosophical inquiry. If pluralism is meant to refer to the inter-disciplinary nature of the book as combining accounts of philosophers and labour law scholars then this is an apt characterisation. But if pluralism is used as a referent to the philosophical exploration of labour law through a representative range of diverse philosophical traditions then this is not as straightforward. Without ignoring some diversity in the accounts of individual chapters, all contributions with few exceptions operate within an analytical liberal political philosophy paradigm. Except for Conaghan's chapter and some references in other contributions, the rich continental philosophy associated with critical theory, post-modernist and post-structuralist accounts in their diverse formulations and shapes (including Queer, anti-racist and post-colonial theories) along with a non-humanist account of Marxism do not find a systematic exposition in individual chapters. Since an admirable feature of this book is that it presents the views of both philosophers and labour law scholars, there is a sense of a missed opportunity to broaden the horizons of labour law scholarship by engaging with the opinions of philosophers of these traditions. This is of course not to deny the presence of pragmatic considerations for this choice not unrelated to the obvious hegemony of a specific liberal paradigm in the Anglo-Saxon scholarship. By labelling this undertaking 'pluralist' however there is a risk that one paradigm is *hegemonised* while others fail even to register as legitimate *philosophical* discourses. Even though the editors acknowledge that 'most contributors have reached for *political philosophy* as their inspiration for reflection on the foundations and normative scope of labour law' (14) there is scope for more reflection on the fact that the overwhelming majority of chapters are inspired from one variant of political philosophy.

The second point concerns the relationship between the 'philosophical' and the 'political'. The editors seemingly adopt a crude and monolithic distinction between 'philosophy' as contemplation and 'politics' as action with no internal relation between them. This view is evident in the following statement addressing what is perceived as a philosophical deficit in labour law. The editors observe that

> [r]ather than engaging in much philosophical enquiry, the subject of labour law has in the past mostly comprised technical legal analysis for the purpose of assisting

> legal practice, or evaluative discussion about the policies embodied in legislation, or calls for activist interventions through the legal process and collective industrial action by workers. This book provides an opportunity to stand back from those other valuable activities and contemplate more fully the central moral and political principles that go to the core of the existence of labour law as a field of legal practice and scholarship (2).

Elsewhere they question whether 'it make[s] any sense to look for *coherent philosophical foundations* of moral and political principles for a subject like labour law that is so clearly the product of historical and *pragmatic political compromises*?' (3, emphasis added).

These statements designate a 'philosophical' that emerges as a metaphysically ordered, coherent land of calmness and unity whose gates are to be accessed by the consciousness of labour law academics amidst the contingent, chaotic and messy world of political compromises. The political reduced to 'compromises' registers only as the messy *concrete* to be instrumentally used for arriving at the 'universal' eternal foundations of the core existence of labour law but to be then discarded as useless as one lifts herself to the universal plane of the philosophical. To be sure, this crude division between the 'philosophical' and the 'political' is not indefensible. However, it is more assumed by the editors than demonstrated. There are multiple critical accounts (such as by Unger, Gramsci, Badiou, Laclau, Zizek or Mouffe to name a few) that problematise this relationship and attempt to account for the 'political' as part of the philosophical. The incorporation of such alternative perspectives would have assisted in avoiding the naturalisation of this distinction of the political and philosophical as radically separate. An additional benefit would be that of including theories that escape the paradox of a political philosophy of labour law without a prominent creative foundational role for political agency which may in turn grant a space for articulating a potential for creativity in the structure and dynamism of the 'philosophical foundations'. This under-theorisation of the political is in my view not unrelated to the noticeably shorter Part III on Workplace Democracy and Self-Determination, a seemingly ideal habitat for these perspectives.

These points in no way detract from the value of this book, a fine product of rigorous, ambitious and sophisticated labour law scholarship. It is perhaps inevitable that as labour law consciously embraces philosophy, the subject will be *more* and not less contested. It is hard to imagine an activity fraught with more controversies in human history than philosophy. In a somewhat perverse sense, the intense contestation and doubting over labour law may be in themselves the most solid sign of its existence. And even though philosophy may fail to deliver the peaceful solace craved by labour law scholars if conducted inclusively, its contribution lies in its capacity to re-integrate labour law questioning into the foundational problems of politics, society and humanity from which it was born. As part of this process we all owe enormous gratitude to this book.

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U. Belavusau and *K. Henrard (eds)*, **EU Anti-Discrimination Law Beyond Gender**, Oxford: Hart, 1st ed, 2018, 392 pp, hb £65.00

This edited volume explores the fate of the 'millennium directives' – the Race Directive 2000/43/EC and the Framework Directive 2000/78/EC – which expanded the EU's anti-discrimination law beyond gender (to race and ethnicity, religion, sexual orientation, age, and disability) and extended its scope (to access to goods and services for race). For this focus, as well as for the range and quality of its chapters, the book makes an important contribution to the literature on EU's anti-discrimination law.

The book is divided into two parts: the first few chapters look at more general, theoretical, cross-cutting and procedural issues, while subsequent chapters look at specific grounds. The methodology of the individual contributions varies from the more doctrinally focused, closely analysing the directives and the case-law (for example by Anna Slezdinska-Simon on religion, Alina Tryfonidou on sexual orientation and Beryl P Ter Haar on age) to the theoretically orientated. For the latter, there are discussions ranging from assessing normative underpinnings, (eg, Morag Goodwin on the marginalisation of Roma and the conceptual inadequacy of the Race Directive and Rachel Horton on why the Court of Justice of the EU (CJEU) is more lenient when encountering measures distinguishing by age than other grounds) to social-science-based approaches (eg, Phillip M. Ayoub using quantitative methods to assess the EU as a source of domestic LGB rights). Moreover, while the book overwhelmingly discusses developments in EU law itself, it also looks beyond it, where relevant. For instance, chapters refer to its domestic implementation (eg, Mathias Möschel on race discrimination or Kristin Henrard showing the difficulties domestic courts have with the sharing of burden of proof), and its interaction with international law (eg, Anna Slezdinska-Simon looking at the ECHR; or Luísa Lourenço and Pekka Pohjankoski, and Lisa Waddington, referencing the UN Convention on the Rights of Person with Disabilities (CRPD)).

The book fills a gap in the literature by specifically focusing on grounds other than sex/gender – the oldest ground in the EU with the richest case-law and literature. The pre-eminence of sex/gender, however, is confirmed even in this book which specifically looks 'beyond' it. Sex/gender is the inevitable reference point for many of the authors (for example Mark Bell in discussing precarious work) and gender is often the starting point for support of the 'millennium grounds' (as Raphaële Xenidis shows, it has been feminist organising which has mobilised on the intersectional agenda). Moreover, as the editors note in the Introduction, one often still has to turn to sex/gender cases, since many important doctrines, developed for the sex/gender context, such a positive action, have yet to be adjudicated on for other grounds.

Another striking issue is that if one takes sex/gender away, it becomes clear how few anti-discrimination cases have actually been decided by the CJEU in the 18 years following the adoption of the 'millennium directives'. This is particularly conspicuous for race. At the time of writing of both the book (2018) and this review (2020), only two 'fully fledged' judgments had been decided on

race and ethnicity (*Feryn* and *CHEZ*). This despite the fact that race is currently given the widest protection under the directives. The book's authors helpfully suggest possible reasons for this. Both Mathias Möschel and Dimitry Kochenov point out that seeing nationality discrimination as an internal market matter, separate from the other anti-discrimination grounds, means that the EU does not offer protection in many cases where matters do, actually, have racial and/or ethnic undertones (see eg the cases *Kamberaj*, *Runevič-Vardyn* or *Huskic* as discussed by Möschel). The dearth of cases on discrimination on the basis of race is even more disturbing considering the persistent marginalisation and hostility towards certain racial and ethnic minorities in Europe, most notably the Roma. Morag Goodwin suggests that this should not surprise us, as the Race Directive's shallow approach – looking at the individual over groups, present rather than history, equality of opportunity rather than result, and individual instances of discrimination over interwoven structures of exclusion – is incapable of addressing Romani marginalisation.

Race is not the only 'millennium ground' to have received very limited judicial attention. At the time of writing of the book, only two 'fully fledged' cases were decided on religion, both regarding the wearing of the Islamic veil in the workplace (*Achbita* and *Bougnaoui*, carefully dissected in a chapter by Eugenia Relaño Pastor). Since then, two other cases were decided, assessing the wide exceptions given to employment by religious organisations in Germany. In *Egenberger*, the Court was asked whether 'membership of a Protestant church' was a 'genuine, legitimate and justified occupational requirement' for expert work for a Protestant church. In *IR* v *JQ*, the question was whether requiring individuals working for religious organisations 'to act in good faith and with loyalty to the organisation's ethos' can mean dismissing a doctor who entered into a second (civil) marriage after divorce ended his first (catholic) one.

While, in these two cases, the Court touched on one difficult issue religion throws up as a ground, namely its relationship to autonomy guarantees for churches – there are other exciting challenges. First, the relative roles of rules on freedom of religion and the prohibition of discrimination on the basis of religion would benefit from clarification. Second, the cases are often intersectional – eg the 'headscarf' cases combine issues having to do with religion, as well as race/ethnicity and arguably sex/gender (discussed by Xenidis). Finally, there is potential for clashes with other grounds – religion has in several cases in other jurisdictions conflicted with sex/gender or sexual orientation (see eg the 'bakery' cases, *Ashers Bakery* before the Supreme Court of the UK and *Masterpiece Cakeshop* before the Supreme Court of the US); Slezdinska-Simon touches on the issue. The CJEU has yet to fully engage with any of these issues, so this is a space to watch.

The ground of sexual orientation has seen relatively high numbers of cases compared to both race and religion. The cases have ranged from determining rights available to same-sex partners in cases such as *Maruko*, *Römer*, *Hay* or *Parris*, to assessing homophobic speech in *Asociatia Accept* (and more recently, after the publication of this book, in *Rete Lenford*). Discrimination on the basis of sexual orientation has been assessed not just in the employment sphere, which is covered by the Framework Directive, but also under the EU Charter of

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Fundamental Rights in the case of *Léger*, relating to blood donations by men who have sex with other men (these cases are examined by Tryfonidou).

The grounds of age and disability have been by far the most prolific in litigation. Age, widely used in legal systems as a criterion in various policy areas and occasionally as a proxy (eg for mental and physical capacity at both ends of the age spectrum) is the only ground in the 'millennium directives' where direct discrimination is not only given limited exceptions, but an open-ended possibility of justification. The breadth of the justifications accepted by the CJEU is subjected to critique by Horton. Focusing on old age, she notes that age appears to be readily accepted as a stand-in for ability, whereas such use of a ground as a proxy would be unacceptable in relation to other grounds – an individual assessment would be required were the ground at stake sex or race. Ter Haar comes to a more positive conclusion in answer to the question of whether the CJEU's treatment of young age fulfils the promises of the EU's Youth Policy.

Much of the litigation on the ground of disability has focused on its definition. Luísa Lourenço's and Pekka Pohjankoski's analysis shows that the CJEU's relatively rich case-law has not been particularly helpful by either being too wide, but rather vague, or too narrow and therefore limiting protection. Another fundamental question which determines the usefulness of anti-discrimination guarantees for the disabled is the definition of 'reasonable accommodation'; an obligation unique and central to the ground of disability. Here, the case law has so far been scarce and thus provides limited guidance. While waiting for future cases to be adjudicated, the authors note that sources external to the EU, notably the European Convention of Human Rights (ECHR) and the Convention on the Rights of Person with Disabilities, offer useful guidance. The role of the CRPD, to which the EU is a signatory, is the subject of Lisa Waddington's chapter. She notes that since international agreements acquire the status of EU law, the CJEU is bound to use the CRPD in interpreting EU secondary law, including the Framework Directive. This has prompted a shift from a medical understanding of disability (in *Chacon Navas*) to a social one (*HK Danmark (Ring and Skouboe Werge)*). The EU has nonetheless narrowed the concept of hindered participation from 'society' to 'professional life'. This excludes certain types of claimants from protection (eg in the subsequent case, *Z*, the impairment of a missing uterus was not deemed to hinder in professional life). She also points out, positively, that the CRPD has had an influence on amendments to the directive proposed in 2008 (not yet adopted) which would expand the scope of anti-discrimination law for the 'millenium grounds' beyond employment, and introduces a reporting mechanism.

What emerges from the book as a whole is a cautiously optimistic picture. The new grounds have introduced new types of anti-discrimination law concepts, such as reasonable accommodation. Litigation around them has also generated doctrinal developments, which might not have happened merely on the ground of sex/gender, and which have enriched and expanded protection from discrimination. For example, the Court has recognised speech as a possible instance of discrimination (*Feryn* and *Asociatia Accept* on racist and homophobic speech respectively). Connectedly, the Court no longer requires an identifiable victim of discrimination (*ibid*) and it accepted the possibility of a case brought by

a person who lacks a protected characteristic (*CHEZ*). But the case-law can also be critiqued for not recognising intersectional discrimination (Xenidis), for an unduly extensive use of a comparator (eg precarious work in *Wippel* discussed by Bell, 84–85), and its acceptance of certain overbroad measures where a more stringent scrutiny of proportionality might have been appropriate (eg blood donations discussed by Tryfonidou, 245). As for the domestic implementation of the 'millennium directives', it appears to vary greatly, from the competences and activities of equality bodies, to the effectiveness of enforcement of anti-discrimination rights by the courts. It is perhaps to the national level, both in relation to sex/gender and beyond, that the attention of EU anti-discrimination law scholars should turn next.

*Barbara Havelková**

Joanna Bell, **The Anatomy of Administrative Law**, Oxford: Hart Publishing, 2020, xlii + 269 pp, hb £75.00

A striking feature of Joanna Bell's book is the red rose adorning the front cover. What, one may ask, does this have to do with administrative law? A 'beautiful' rose seems ill-fitting to the messiness, complexity and, some would say, the unstructured nature of administrative law; perhaps a gravy boat of 'hotchpotch' stew might have been more apt. For Bell the symbol of the rose is indeed central to her anatomical approach. She recounts a monologue by the theoretical physicist Richard Feynman that has become known as his 'Ode to a Flower' (6-7). This is an exchange between Feynman and an artist friend, in which the friend bemoans the scientific preoccupation with taking things apart, and the way that this detracts from the complete beauty of the rose. Feynman responds that what is aesthetically pleasing can exist in many forms, and that there are all kinds of questions that science adds into the mix of what is exciting, mysterious, and ultimately beautiful about the flower.

From this anecdote, Bell explains Feynman's recognition that the flower is made up of many small components and complex processes, and as such it cannot be neatly summed up in terms of a single idea. Now the spark of recognition should be burning brighter in the minds of administrative lawyers. Administrative law is a subject that has been grappling with the search for a single 'organising concept', a harmonising theory or, as Bell describes it, some 'monistic' principle that is capable of uniting the whole compass of the subject in a uniquely beautiful way. Bell's is among an increasing number of voices suggesting not only that such an organising concept is yet to be found, but also, adapting Feynman's 'pulling apart' anatomical method, that the search may continue to prove fruitless. Bell describes this conclusion to her work as cynical, but to me the book as a whole has an inherently positive and refreshing tone. In showing

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us how we can think differently about administrative law, it is clinical rather than cynical.

The crux of Bell's argument is that pulling apart administrative law doctrine in this anatomical way demonstrates that the legal structures at play in administrative law adjudication are both complex and varied (especially in Chapter 3). Bell proposes three core senses of complexity: that legislative detail matters enormously in administrative law adjudication; that administrative law pursues varied normative goals; this variety is due both to the diverse legal origins of administrative law values, but also to the third core sense of complexity, namely that the beneficiaries of administrative law are also varied and as such sit in different kinds of relationships with the administrative decision-makers they seek to challenge.

Bell joins other scholars, notably Harlow and Rawlings, and Arvind and Stirton, in emphasising the messy and pluralistic origins of administrative law, in particular by encouraging the restoration of forgotten connections with administrative practice, and variable anchorage in different types of administrative power (58-63). It is hard to conceive of administrative law in England and Wales as the product of a single architect's design, despite the crucial role arguably played by individual judges. Arvind and Stirton, for example, consider Lord Diplock to have been highly influential in the development of judicial review at least ('The curious origins of judicial review' (2017) 133 *Law Quarterly Review* 91).

A key contribution of Bell's book is to spotlight the importance of statutory schemes to administrative law adjudication. Her approach is not to maintain, as others have, that a connection, perhaps any connection, to statute is crucial to the constitutional legitimacy of judicial review, but instead to show the various ways in which administrative law adjudication interacts with statutory schemes. As she states:

> … the grounds of review do not function as a series of freestanding legal tests which apply directly to the facts of the case and mechanistically determine the proper legal outcome … administrative law doctrine often interacts closely with the particular legislative framework in the background of the challenge. The legislative frameworks with which administrative law doctrine interacts, furthermore, are not of one kind. Rather they vary significantly, in their aims, structure and detail, from one to the next (66).

There are many different kinds of legislative framework: from those that are primarily designed to regulate individualised decision-making (such as social security and housing benefit decisions, or licencing decisions); to those that regulate decisions about how people ought to be treated; to those which regulate decisions about the protection and promotion of collective public interests. Administrative law doctrines, the so-called general principles or grounds of review, interact in different ways with the structure and detail of these different types of statutory schemes, with the statutory background itself often becoming more complex over time; one need only think of immigration and planning law to illustrate such complexity. Moreover, as Bell acknowledges, there is reason to

think that the background administrative schemes to various administrative law challenges are increasingly rich in detail. This is likely, at least in part, to be due to a combination of the increased quantity and density of secondary legislation, and a growing role for 'soft law' sources, including government guidance and administrative policy, both in framing procedures and in structuring administrative discretion.

The various ways administrative law doctrine interacts with different statutory schemes is also related to the second sense of complexity, the diversity in the origins of administrative law values. Bell adds her unique voice to scholarship emphasising the significance and diversity of administrative law values to doctrinal development. Notable here is the work of Paul Daly who has developed a values-based account of administrative law, stressing the centrality of the rule of law, good administration, democracy and separation of powers ('Administrative Law: A Values-Based Approach' in Bell, Elliott, Varuhas and Murray (eds), *Public Law Adjudication in Common Law Systems*, Hart Publishing, 2016, 23, 35). In my own work I suggest there may well be other significant values, including legal and administrative rationality (*Reconstructing Judicial Review*, Hart Publishing, 2016); Joe Tomlinson contributes by picking apart various administrative justice values, including transparency, efficiency, accountability and equal treatment ('The Grammar of Administrative Justice Values' (2017) 39 *Journal of Social Welfare and Family Law* 524). Bell does not seek to provide a list of pertinent values, acknowledging the difficulty, perhaps impossibility, of developing an exhaustive register. Her insight is that the kind of values highlighted in that body of work, and which are perhaps best (though not exclusively) understood as what she terms 'common law values', interact in complex and diverse ways with legislative purposes. For Bell the diversity of these values stems in part from the range of beneficiaries of administrative law, that is those whose interests administrative law seeks to protect.

Bell concludes it is incorrect to think that administrative law is concerned centrally with the promotion of public interests. As she states, this 'overlooks the inherent variety of the legislative and administrative schemes that form the background to many administrative law challenges' (78). She rejects the view that administrative law can be 'taxonomised' or as I have referred to it 'bifurcated or trifurcated' by organising public law doctrines in terms of their functions; where administrative law is seen as protecting the public interest and human rights law individual private interests. Whereas my work has questioned this taxonomical approach as failing to fit with the organisation of legal practice, Bell resists it head on by questioning its fit with doctrine. As she concludes:

> An attempt to allocate the grounds of review to different categories by reference to the legal values which they serve to promote may obscure more than it will reveal … it is difficult to draw neat lines between different categories of legal value; there is, for instance, no clear distinction between values derived from the common law and those which underlie legislation, nor between the interests of the public and those of the individual. This has important implications for the taxonomical endeavour. It means that a singular ground of review might serve as the basis of judicial intervention for the protection of different interests depending on the legislative context in which a challenge arises (83).

The third, and related, sense of complexity that Bell explains is the plurality of relationships with which the courts grapple in administrative law adjudication and how these relationships are based on different kinds of right-duty correlativity. She concludes, contra Jason Varuhas especially, that there are many instances of administrative law adjudication in which courts are concerned with individual right-duty correlativity as opposed to collective right-duty correlativity. Bell provides numerous examples of legislative frameworks specifically conferring rights on individuals, such as to receive benefits or entitlements if they meet set criteria. Likewise, there are examples of courts regarding the common law itself as conferring procedural rights, such as to an oral hearing, or the right to have one's case considered under policies the executive sees fit to adopt. From my own research I find that empirically these kinds of cases, which are often individual grievances turning on their own facts, make up the majority of judicial review claims in the Administrative Court, and the phrase 'public law right' appears with increasing frequency across relevant case law.

While the present review focuses more on the general, conceptual and methodological elements of Bell's book, these elements themselves are built from case law analysis most notably in three specific areas: procedural review, legitimate expectations and standing. These analyses form a concrete evidence base for Bell's wider conclusions about the anatomy of administrative law, but they are also important contributions advancing understanding of these topics (Chapters 4, 5 and 6). My interpretation of Bell's broader argument here is that the felt need to adopt a master principle, even for a specific area of doctrine such as procedural review, obscures the complexity and variety of administrative law's anatomy. This has possibly concerning consequences, such that what might be ordinary and legitimate, perhaps even routine decisions, within a particular framework of statutory schema, values and relationships, can come to be seen as unpredictable, incoherent or even activist decision-making. The anatomical approach conversely reveals greater evidence of predictability and coherence, and more judicial restraint.

I wonder how the collective set of grounds under the heading 'substantive review' would fare under Bell's microscope. Various works have identified 'indicia' of unreasonableness, but reasonableness too is a concept that varies with the statutory background. Quite often in case law, decisions taken against a detailed statutory scheme (including delegated legislation and soft law) are referred to as unreasonable, as opposed to as having been taken for an improper purpose or falling foul of principles around the relevance of considerations. It would be valuable to see Bell's approach to this topic and, in particular, to observe how the genre of common law constitutionalism, the broader culture of justification, or Daly's values-based account, fare as organising concepts when pulled apart using Bell's method, since one can argue that these approaches are generally more accommodating and sensitive to context than the jurisdictional and public interest accounts she rejects.

Administrative law is increasingly being approached from a range of methodological perspectives, historical, empirical, philosophical, and combinations of each. Some might see this increased variety as stemming from an inherent dissatisfaction both with existing doctrinal law, and doctrinal methods of analysis

more generally. For example, in his review for this journal of Dean Knight's, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, 2018), Peter Cane suggests that those who use philosophical and social scientific methods strike out in these directions because they find common law doctrinal analysis to be 'anaemic and unsatisfying'. It should be said that Knight's analysis, as Cane would classify it and as do I, is an excellent example of doctrinal scholarship, which also provides a normative framework for assessing the value of doctrine. Cane suggests that, at least the 'judicially-approved' role for common law scholars, is to develop principles 'that make the whole body of relevant law as internally consistent and coherent as reasonably possible'. In contrast, Bell's anatomical approach does not explicitly seek out internal consistency, rather she looks to the elements of doctrine in terms of their position, relations, structure and function. Space precludes full discussion of Bell's professed cynicism towards organising concepts, but a key insight is her view that intelligibility, coherence and unity tend to be equated in the search for a monistic principle, and that this is related to a felt need to morally justify an area of law as a whole (230-237). Bell concludes, as do I, that no attempt to render various doctrines coherent could be a purely descriptive exercise, but this is no bar to accounts that strive to promote intelligibility by explaining the causes and nature of doctrinal complexity, including by reference to values, and by helping readers to understand why the law is not coherent. Such intricacy and complexity, as revealed in *The Anatomy of Administrative Law*, is neither anaemic nor unsatisfying, and no less aesthetically pleasing than the red rose gracing the book's front cover.

*Sarah Nason**

Bruce A. Kimball and *Daniel R. Coquillette*, **The Intellectual Sword – Harvard Law School, the Second Century**, Cambridge, MA: Belknap Press, 2020, 880 pp, hb £39.95

The second volume of the history of the Harvard Law School, *The Intellectual Sword*, by Bruce A. Kimball and Daniel R. Coquillette is a massive example of the institutional historian's art. I shall first summarise this book and then offer an assessment of it.

Kimball and Coquillette pick up the story of the Harvard Law School where its predecessor, *On the Battlefield of Merit*, left off – with the appointment of A. Lawrence Lowell as the University's new president, the retirement of Dean James Barr Ames and the appointment of Ezra Ripley Thayer, the son of Harvard law professor James Bradley Thayer, as the Law School's new Dean. Thayer, who came directly from legal practice, saw no reason to alter the School's financial model of low tuition, high enrollment taught in large classes, and ruthless culling of the herd at the end of the first, and to a lesser extent second, year

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using tests administered at the end of the school year. Meticulous, by nature, he was extremely worried that his work as both a teacher and scholar would never be as good as that of his colleagues. It did not help that the Law School was tuition dependent and deeply in debt from the building of Langdell Hall. These worries grew stronger over five years and in the end likely caused Thayer to commit suicide.

Roscoe Pound, an already famous, seemingly liberal scholar who had joined the faculty in 1910, was the next Dean. He inherited a capital campaign, begun by Thayer, that was ill-conceived, poorly run, interrupted by World War I, and undermined by the University's own efforts to build its endowment. It did not help that Pound was uninterested in making personal appeals to possible donors and that his written appeals for funds were leaden. While he understood that the school's financial situation was precarious, a following fundraising campaign between 1925–27 was no more successful.

As Dean, Pound never wavered from his support for a large entering class ruthlessly culled, though he did expand the geographic and social range of accepted applicants and resisted pressure from President Lowell, to reduce the enrollment of Jewish students. Whether his support for Jewish students extended to Jewish faculty is complicated as he seemed to support some Jewish candidates and oppose others.

Though well known for his early articles that argued against judicial formalism and in support of sociological jurisprudence, after World War I Pound's politics seemed to shift rightward so that by 1930 he rose to Karl Llewellyn's bait in 'A Realistic Jurisprudence – The Next Step.' In reply, he published a very weak and general objection to Llewellyn's identification of what came to be called American Legal Realism, but refused to identify the scholars whose work he was attacking, and so was forever stuck in the 'Realism Controversy' when Llewellyn replied.

In the aftermath of the Depression and with the advent of the New Deal, Pound became increasingly opposed to the growth of administrative agencies. While members of his faculty were traveling to Washington to help those same agencies, he began to make trips to Germany and Austria that indicated a willingness to accept and perhaps cultivate recognition from the Nazi regime. Open warfare with the faculty lead the University's new president, James B. Conant, first to assume the job of chairing Faculty meetings and then to appoint the members of a special faculty committee on curriculum reform. The two-year effort brought forth evidence of students' discontent with their education, though in the end no significant changes were made. Perhaps this show of Presidential displeasure was enough for Pound, for soon after he stepped down as Dean.

Pound's successor was James M. Landis, a wunderkind who had become a faculty member one year after his graduation. After seven years of teaching, he joined the New Deal at the Federal Trade Commission and then the Securities Exchange Commission. Landis returned to the Law School as Dean in 1937. There he engineered a revision of the school's admissions policies that had the effect of reducing student attrition at the end of the first year from over 30 to about 20 per cent. With the outbreak of World War II Landis again returned to

Washington. When he returned to Cambridge in 1945, Landis tried to mobilise the faculty to deal with the content of the J.D. program. However, before that committee could accomplish anything, marital discord, and the accompanying public scandal in what was still a small college town, quickly led him to resign and return to Washington as chairman of the Civil Aviation Board.

Soon after Landis resigned Erwin Griswold, one of the members of Landis' committee on the J.D. program, was appointed Dean. These were the years when the first wave of returning GI's led the law school to open its doors to returnees by offering three semesters of instruction each year. The accompanying pressure led to the establishment of offices to administer admissions, placement, and alumni affairs, as well as to the construction of additional dorm space and a commons.

In the late 1940s and early 1950s many in the University were caught up in the second Red Scare's investigations into communism that touched both faculty and students. Four former and present students were caught up in these investigations that divided both faculty and students. Interestingly Griswold's personal experience of the impact of an investigation on an alumnus and the students brought him publicly to change his mind about the scope of the privilege against self-incrimination of the Fifth Amendment from the position that the privilege extended only the actually guilty to one that the privilege should also include those who feared the impact of even an unsuccessful prosecution on their reputation.

Harvard Law School had long admitted any male who could pay and then used the 'intellectual sword' to winnow the class. With growing numbers of applications, Griswold quickly decided that such a system was untenable. The School began to use what became know as the LSAT as part of increasingly complicated ways of deciding who among similar test takers would be admitted. Attrition slowly declined to about one per cent. Then in 1950 the school finally decided to admit women. The lot of those few women who attended was not easy and was not made easier by the faculty, especially the Dean, who regularly reminded these students that they had taken a place in the class that might have gone to a male breadwinner.

At the same time Griswold doubled the size of his faculty, including some New Deal veterans, some Jewish men, but no women, and urged all to produce more scholarship, apparently rewarding those who did and so indirectly penalising those who didn't. He also regularised the appointments, promotion and tenure practices. This expansion was financed by slightly increasing the size of the first year class as well as of tuition. Though the expanded faculty lowered the student faculty ratio significantly, Griswold did little to alter the mostly mandatory courses in the second year. Instead, resources were put into more and small third year and graduate classes. And finally he mounted a fairly successful, though rather hands-off, capital campaign that funded two of the eight buildings he built during his 21 years as dean.

Faculty, especially new faculty, experienced the Dean as heavy-handed. Students felt oppressed, especially as the impact of selective admissions lead to a class that was more homogenous in ability, but still grasping for the same few spots at the top of the class. Griswold, who in retrospect seemed to be trying to

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recreate the school from his youth at a time when the social ructions that are called the Sixties were on the horizon, in the end seemed just tired. Asked whether he wished to be considered for the post of Solicitor General, he took fifteen seconds before he said yes and was gone in about a month.

When Griswold retired, he was replaced by Derek Bok, who was about a generation and a half younger. The faculty apparently breathed a sigh of relief. The gesture turned out to be inappropriate. Bok served but two and a half years, years that were dominated by unrest related to the Vietnam War, the lack of African-American students and faculty at Harvard generally and at the law school in particular, and student objections to the grading system. All three started before Bok took office and continued after he left. While in office he oversaw a change in the grading system from numerical to letter grades and an upward shift in the median grade, a war-related sit-in at University Hall that resulted in contentious disciplinary action against five law students, a civil rights related sit in at University Hall, and a riot in Harvard Square following the Kent State shootings of students protesting the Vietnam war that immediately disrupted the Law School's final exams. Still, Bok had done a good enough job as Dean that he was soon named President of the University.

Albert Sacks, Bok's Associate Dean and successor, faced problems of race and gender in his faculty. While the ten years of his deanship saw slow but steady growth of women law students, women law professors were another matter. A faculty 'boys club', unconscious that it was such, that apparently met daily for lunch, would seem daunting even to the newest male faculty members just as would a class of 135, mostly male students ready for blood. So it is not surprising that of the ten women who taught during the last six years of Sacks' deanship, only one, Elizabeth Owen, received a tenure-track offer; of the three hired directly to tenure track positions two left after two years, and the third had to fight for tenure over several years. Of the three appointed in the final years of the deanship, only two received tenure. Similarly, of the four African American males hired beginning in Bok's administration, two eventually left.

At the end of Sacks's term of office, continued student agitation for grading reform and a more general concern about the curriculum all got shunted to what was called the Michelman Committee. That committee may have been broadly representative of the faculty, but in any case it led to no significant change on either topic. And while nothing much was happening, what Sacks had done was to support a great expansion of extracurricular groups loosely tied to the law school and the first attempts a providing clinical experiences.

The Intellectual Sword finally ends with a brief discussion of the fights over Critical Legal Studies that broke out with the faculty discussion of the Michelman Committee's report, the growth of Law and Economics and other conservative movements among the faculty, fights over appointments, and finally an assertion that the School's continuing failure to address its financial problems, caused by the unremitting reliance on a financial model that necessitated large enrollment taught in large classes, led to a culture of male student competition that made it hard for the School to open to women, as well as students of color.

We have needed a serious history of the Harvard Law School for a quite a while now and I say that as a person who loved Arthur Sutherland's history for

the gracious elegance of the story it told. This second volume of that needed history is just as exhaustively researched and reader-friendly as the first. Like the first volume, it tells us something about student life inside the Law School, this time in the 1970's and 1980's when it finally broadened out from the top fifty or so students in a class. It also deals forthrightly with the University's and so the Law School's problems with females, Blacks and other minorities, and Jews as teachers and students. And it situates the story that it tells within the social and political surround.

It tells the reader much, perhaps too much, about the problems with the School's continuing financial dependency based on the model of large entering classes of students who were intentionally and ruthlessly pruned. This was the model Langdell and Ames had bequeathed the school and, more importantly, one that because of its seeming success validated the choice of most law schools to adopt the same financial structure.

The authors offer many names for this program of education designed to establish 'academic merit', most tellingly 'The Intellectual Sword', but also 'Spartan manliness'. Both combined notions of learning and battle. In the earlier years the products of such an education were seen as predominantly white male Protestant Christians. When combined, the program and its product recall the notion of Muscular Christianity that began to appear in American culture about the same time as the Harvard Law School became Langdell's Law School. A good example of the muscular Christian male is President Theodore Roosevelt of Buffalo Hunter and Rough Rider fame. Of course, the Harvard faculty's understanding of this model of the good young lawyer moved the field of battle from the outdoors into the classroom. Still, this ideal survived at least into the post-World War II years and the struggle for the inclusion of Jewish, female and African- American faculty showed its lingering strength.

In identifying this continuity I do not wish to be seen as singling the Harvard faculty out for special opprobrium. I am pretty sure that in many places Muscular Christianity was a commonplace understanding of the world. In those places it was as invisible as water would be to a fish. But I do wish to note that the failure to label this understanding as an ideology contrasts with the decision to let pass without comment the assertion that Critical Legal Studies was an ideology, a way that those of us in that movement understood the water we swam in.

The failure to recognise that 'The Intellectual Sword' was an ideology of its own, such that when Harvard deans had a chance to alter the School's financial, and so academic model, that road was regularly not taken, raises the question of exactly why the book's narrative is organised in terms of deanships. Thayer's deanship amounted to nothing. All Pound succeeded in doing was to maintain a graduate degree program that may have or may not have drawn funding from the School's already tight budget for the professional degree program. Landis's tenure was too short and intermittent to have done better. Griswold's greatest achievement seems to have been to bully the faculty into doing what he told them to, though personal credit must be given to his broadened understanding of the Fifth Amendment and expansion of the faculty to include Roosevelt Administration administrators. Bok was not around long enough to accomplish

much; Sacks was around long enough to accomplish much, but didn't, apparently because he was too nice a guy. The only thing that holds this progression together is a continuing reluctance to tamper with the undergraduate program, especially the first year centered in common laws subjects, even though it was slowly aging, if not ossifying.

With such a record of inaction, wars would have been a sufficient organising principle since there were three of them, each with a particular impact on the school. However, the choice to organise the book in terms of deanships did have one advantage that wars would have lacked. It focused the narrative on matters of internal bureaucracy. Doing so avoided the necessity of attending to the oddness of learning interesting things about student life and almost nothing about faculty life. What did faculty do all day other than teach and maybe produce casebooks? The reader learns surprisingly little about faculty scholarship after the completion of Williston's treatise on Contracts and Scott's on Trusts except for some work by Pound, a bit by Frankfurter, and then later by Henry Hart, Al Sacks and Lon Fuller. The shortness of this list of names provides modest support for those Harvard presidents and some Law School Deans who regularly complained about how little scholarship the faculty as a whole produced. Whether this assertion was true when measured against the work of scholars at other major law schools is another matter.

I doubt whether attention to the scholarship of other Harvard faculty members could have been that embarrassing. Every faculty has tenured colleagues whose publications were of questionable value or closer to non-existent than a dean might have liked. And speaking of colleagues, soon after moving from Columbia in the late 1920's, Thomas Reed Powell observed that, compared to the life at his former school, Harvard had 'little faculty culture.' Could this have been true when the faculty shared lunch five days a week, an event that seems not to have been particularly welcoming of newcomers, especially women? And who paid for these lunches – student tuition?

Now, the failure to see ideology everywhere it is found and to address faculty life and scholarship, should not be taken to diminish the achievement that is this volume and its predecessor, but rather to set a mark for later scholars to address – and where the Harvard Law School is concerned there will be some. Such later scholars will have their work cut out for 'The Intellectual Sword' is an extraordinary achievement. To research so exhaustively and organise the resulting mountain of material into a really coherent, well-written whole, even though doing a more complete job was undermined by a suspicious change in Harvard Library policy about access to administrative records and personal papers, justly requires the highest professional accolades. I am pleased to offer them.

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